

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

| | | |
|---------------------------------|---|---------------------------|
| DARRYL ORRIN BAKER, |) | |
| |) | |
| Plaintiff |) | |
| |) | |
| v. |) | Civil Action No. 05-147E |
| |) | |
| UNITED STATES OF AMERICA |) | JUDGE McLAUGHLIN |
| GOVERNMENT OFFICIALS AT |) | MAGISTRATE JUDGE PARADISE |
| FCI-McKEAN, WARDEN, OFFICER |) | BAXTER |
| B. WESEMEN, MEDICAL DEPARTMENT, |) | |
| |) | ELECTRONICALLY FILED |
| Defendants. |) | |

**DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION TO AMEND
SECOND AMENDED COMPLAINT¹**

AND NOW, come Defendants, United States of America, Government Officials at FCI-McKean, Warden, Officer B. Wesemen, and Medical Department, by their attorneys, Mary Beth Buchanan, United States Attorney for the Western District of Pennsylvania, and Paul E. Skirtich, Assistant United States Attorney, and, pursuant to this Court's Order of January 30, 2006, file the following Response to Plaintiff's Motion to Amend Second Amended Complaint.

¹ On August 19, 2005, Plaintiff filed his original Complaint in this case. On December 8, 2005, Plaintiff filed a Motion for Leave to File Second Amended Complaint, which was denied for technical reasons. On January 4, 2006, Plaintiff renewed his Motion to Amend Second Amended Complaint. Defendants note that Plaintiff has never filed what he labeled and should have been labeled as a First Amended Complaint; it is Defendants' position that Plaintiff's current filing is his First Amended Complaint. For purposes of this Motion, however, Defendants will refer to the motion filed by Plaintiff on January 4, 2006, as his Motion to Amend Second Amended Complaint.

In support of their Motion, Defendants respectfully aver as follows:

1. On August 19, 2005, Plaintiff *pro se* filed a Complaint at this civil action number. (Docket, Document #10).

2. On December 8, 2005, Plaintiff *pro se* filed a Motion for Leave to File Second Amended Complaint, which was denied the next day for technical violations.

3. On January 3, 2006, Defendants filed their Motion to Dismiss Plaintiff's Complaint, or in the Alternative, Motion for Summary Judgment.

4. On January 4, 2006, Plaintiff *pro se* filed his Motion to Amend Plaintiff's Second Amended Complaint with proper attachments.

5. Due to Plaintiff's incarcerated status, his Motion to Amend is deemed filed on December 14, 2005, the date Plaintiff claims it was sent from his prison. See Houston v. Lack, 487 U.S. 266 (1988). Regardless of the actual date sent, obviously the motion was mailed prior to January 3, 2006, and thus, Plaintiff's Motion to Amend was "filed" prior to Defendants filing a responsive pleading.

6. Pursuant to Rule 15(a) of the Fed. R. Civ. P., "[A] party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served..."

7. Consequently, this Court must allow Plaintiff to amend his Complaint.

8. After perusal, Plaintiff's Amended Complaint differs from his original in the number and type of claims thus necessitating another responsive pleading to be filed by Defendants, in conformity with Rule 15(a).

WHEREFORE, based on the above, Defendants do not object to the filing of Plaintiff's Second Amended Complaint and asks this Court for a responsive pleading date of 10 days from this Court's granting of Plaintiff's Motion.

Respectfully submitted,

MARY BETH BUCHANAN
United States Attorney

s/Paul E. Skirtich
PAUL E. SKIRTICH
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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of February, 2006, a true and correct copy of the foregoing Defendants' Response to Plaintiff's Motion to Amend Second Amended Complaint was electronically filed and/or served by first-class U.S. mail, to the following:

Darryl Orrin Baker
USP Lewisburg
U.S. Penitentiary
Post Office Box 1000
Lewisburg, PA 17837

s/Paul E. Skirtich
PAUL E. SKIRTICH
Assistant U.S. Attorney